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## **Mandatory Reporting of Suspected Elder Abuse and Neglect: A Practical and Ethical Evaluation** Stephen G. Coughlan, Barbara Downe-Wamboldt, Robert G. Elgie, Joan Harbison, Pat Melanson

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Mandatory Reporting of  
Suspected Elder Abuse  
and Neglect: A Practical  
and Ethical Evaluation

*The Province of Nova Scotia, in keeping with a growing North American trend, has enacted the Adult Protection Act, a law which makes the reporting of elder abuse mandatory in certain instances. This article examines the practical and ethical justifications for such a law and discusses whether scarce public funding and resources might be better allocated in a different manner to combat this serious, but somewhat misconceived, problem. The authors conclude that the legislation may be inappropriate, since from a practical perspective it is unlikely to alter current behaviour and from an ethical perspective, it is unclear that all ethical concerns have been adequately addressed. Furthermore, the authors argue that the effect of the legislation is to characterize the problem of elder abuse in a manner which may not maximize assistance to those who suffer from such abuse.*

*L'assemblée législative de la Nouvelle-Écosse, suivant une tendance nord-américaine de plus en plus répandue, a adopté une loi concernant la protection des adultes, (Adult Protection Act), une loi qui rend la dénonciation des mauvais traitements à l'égard des aînés obligatoire dans certains cas. Cet article examine les justifications d'ordre pratique et déontologique qui sous-tendent une telle loi et cherche à déterminer si les ressources publiques limitées pourraient être allouées autrement et plus efficacement afin de combattre ce problème sérieux, mais combien mal compris. Les auteurs concluent que la loi est peut-être inappropriée, puisque, d'une part, il est peu probable qu'elle arrive à modifier les comportements à l'origine du problème. D'autre part, il ne semble pas que toutes les préoccupations d'éthique aient été prises en considération dans l'élaboration de la loi. De plus, les auteurs soutiennent que la loi a pour effet de définir le problème des mauvais traitements fait aux aînés de telle façon qu'elle pourrait entraver et limiter sérieusement l'accès à l'aide requise par les victimes de tels traitements.*

### *Introduction*

Nova Scotia has enacted the *Adult Protection Act* as a response to the problem of elder abuse.<sup>1</sup> Part of that Act is the requirement that “[e]very

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1. “Elder abuse” is a simple term which disguises a great deal of disagreement. The four Atlantic provinces have adopted Adult Protection statutes, but the definitions of “abuse” and “neglect” differ between them. There is not wide agreement elsewhere on how the terms are

person who has information, whether or not it is confidential or privileged, indicating that an adult is in need of protection shall report that information to the Minister.”<sup>2</sup> Mandatory reporting of suspected child abuse is quite common: mandatory reporting of “elder abuse” is less common, and more controversial. In Canada, few statutes require mandatory reporting where adults are concerned, but new instances continue to arise.<sup>3</sup> This article will examine whether mandatory reporting laws of this type are effective or desirable.

There are many problems in society, but we do not usually require that the problems of third parties be reported to an agency of the state. That approach is adopted only in unusual circumstances. This paper therefore proceeds on the assumption that mandatory reporting needs to be specially justified: unless some argument can be made regarding the particular need for elder abuse to be reported, reporting should not be made mandatory.

Any justification for a mandatory reporting law must succeed on two levels: it must be justified on both practical and ethical grounds. There are many arguments for and against mandatory reporting, and if it cannot be justified on ethical grounds, then it should not be enacted in legislation. But before reaching that stage, it must be asked whether a mandatory reporting law will actually accomplish anything. If the law does not in fact increase the number of cases of elder abuse that are found, then there is no practical reason for having it. In that case, it would be unnecessary to consider how the ethical considerations should be balanced against one another.

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to be used. See *infra* note 42. This very confusion is an issue in deciding whether mandatory reporting is appropriate. For purposes of this paper, it is sufficient to distinguish generally between three situations: abuse, where a caregiver actively injures the physical or psychological well-being of the adult in his or her care; neglect, where a caregiver fails to provide adequately for the needs of the adult in his or her care; and self-neglect, where an adult has no regular caregiver, and fails to provide adequately for his or her own care. These distinctions are not always clear-cut. However, the general difference between the situations should be clear enough for present purposes. Where the context requires, we will distinguish between these situations: for the most part, however, references to “abuse” should be taken to imply all three situations.

2. *Adult Protection Act*, R.S.N.S. 1989, c. 2, s. 5(1). In addition, s. 16 of the Act makes it an offence to fail to report such information.

3. Ontario’s *Advocacy Act*, S.O. 1992, c. 26, s. 32(11) contains a mandatory reporting requirement for advocates. Legislation was proposed in Quebec in 1995 which would have created a mandatory reporting law similar to that in Nova Scotia. Mandatory reporting of elder abuse is quite common in the United States. Forty-three states have some form of adult protection legislation, of which 38 contain a mandatory reporting requirement. See J. Harbison *et al.*, *Mistreating Elderly People: Questioning the Legal Response to Elder Abuse and Neglect*, vol. 1 (Halifax: Elder Abuse Legislation Research Project, 1995) at 39.

### I. *Is Mandatory Reporting Justified at a Practical Level?*

The primary practical justification for mandatory reporting is that it will allow action where otherwise no action could be taken. Three assumptions must be true for a mandatory reporting law to be justified on that ground. It must be true that: 1) the people to whom the law applies would not report suspected cases of abuse if they were not required to do so by law; 2) those people will report suspected cases of abuse if there is a mandatory reporting law; and 3) the cases reported due to mandatory reporting would not otherwise have come to light. If these assumptions are not true, either in general or in the case of a particular law, then the law will not change behaviour, and will not uncover new cases of abuse. In that event there will be no beneficial effect from a mandatory reporting law, and so there would be little reason to enact one.

#### 1. *Are People Reluctant to Report Suspected Abuse?*

It seems reasonable to suppose that many people are reluctant to report suspected cases of abuse: if that were not so, mandatory reporting would not be controversial. However, the situation is not unambiguous. First, it should be noted that people might have various reasons to be reluctant to report suspected abuse. A general unwillingness to interfere in other people's affairs could make anyone disinclined to report. In addition, health professionals, who might be in a position to see a great deal of abuse, will often have a confidential relationship with the victim: in that case, reporting the suspected abuse against the wishes of the patient would seem to be acting unethically judged by the usual standards. In addition, some professionals might be reluctant to violate the confidence of patients not just on ethical grounds, but also out of the fear that patients will thereby be driven not to seek help in the future.

Furthermore, the reluctance to report abuse is by no means uniform. In the United States, experience has shown that a great deal of voluntary reporting takes place. Several studies have found that in states where professionals are required to report suspected abuse, a great deal, if not sometimes the majority of reports come from private citizens who have no legal duty to report.<sup>4</sup> Similar observations have been made concerning

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4. D. Lee, "Mandatory Reporting of Elder Abuse: A Cheap But Ineffective Solution to the Problem" (1986) 14 Fordham Urb.L.J. 723 at 740; L.R. Faulkner, "Mandating the Reporting of Suspected Cases of Elder Abuse: An Inappropriate, Ineffective and Ageist Response to the Abuse of Older Adults" (1982-83) 16 Fam.L.Q. 69 at 78 and 80; K.D. Katz, "Elder Abuse" (1979-80) 18 J.Fam.L. 695 at 707; E. Salend *et al.*, "Elder Abuse Reporting: Limitations of Statutes" (1984) 24 Gerontologist 61 at 64.

Nova Scotia. People working within the adult protection system have noted the particular reluctance of professionals to report abuse, and also noted that most reports of abuse come from people who are unaware that there is an obligation to report.<sup>5</sup>

In addition, it appears that not all professionals face the same dilemma in considering whether to report: reluctance might depend on the nature of the relationship between the patient and the health professional. Physicians report very few cases of abuse,<sup>6</sup> while emergency room staff have a very high rate of reporting neglect.<sup>7</sup> This difference might be because emergency room staff are less likely to have a long term relationship with the patient, and therefore do not feel as great a dilemma due to confidentiality. Calls for adult protection legislation, both in Nova Scotia and elsewhere, have come from doctors working in emergency care and other health professionals;<sup>8</sup> it is assumed that a person who decries the absence of an agency to which to report problems would in fact report problems if such an agency existed.

Just as importantly, one should note that the reluctance to "report" abuse is related to the type of problem that is perceived, and the institutional responses available. If, for example, a Victorian Order Nurse provides in-home care once a week for an elderly woman, that nurse will be able to tell whether the patient is deteriorating and requires additional assistance. If the nurse feels that the visits should be increased to twice a week, it is part of his or her job to suggest that increased services should be provided. There is no violation of confidence in doing so, and it seems unlikely that most people would have any reluctance to "report" the problem in this context. It is only when the structure of adult protection legislation is superimposed on the situation that a dilemma arises. In Nova Scotia, for example, the nurse must decide whether the woman is neglecting herself, whether the woman as a result meets the test for being "in need of protection", and whether it is therefore mandatory to report her patient to the Adult Protection Agency. Leaving that construction of the problem aside, it seems that a great deal in the way of service delivery

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5. See Harbison, *supra* note 3, vol. 1, appendix F at 242.

6. Salend, *supra* note 4 at 64 notes that only 2% of the 5664 reports made in South Carolina between 1975-80 came from doctors. See also N. Gnaedinger, *Elder Abuse: A Discussion Paper* (Ottawa: Health and Welfare Canada, 1989) at 13.

7. J. Palincsar & D.C. Cobb, "The Physician's Role in Detecting and Reporting Elder Abuse" (1982) 3 J.Legal Med. 413 at 421-22.

8. N.H. Hansen, "The Vulnerable Elderly in Nova Scotia: Their Abuse and Neglect" (1984) 63 N.S. Med. Bull. 111; Salend, *supra* note 4 at 63; T.G. Leroux & M. Petrunik, "The Construction of Elder Abuse as a Social Problem: A Canadian Perspective" (1990) 20 Int.J. Health Serv. 651 at 661.

could be done without violating confidentiality, or creating the controversy caused by mandatory reporting. That is, a reluctance to "report" need not reflect unwillingness to become involved with a problem; it can simply reflect reluctance to prompt a particular bureaucratic response.

On the whole, it is reasonable to assume that there is reluctance to report in some quarters, and therefore that some people will not report abuse if they are not required to do so. It is worthwhile, however, being clearer on where the objections come from, and the nature of them, in deciding what type of law is appropriate. If private citizens are generally willing to report, but doctors and other health professionals are unwilling, perhaps a law should be aimed at the particular concerns of, and possibly only apply to, the group whose behaviour will be affected.

## 2. *Will People Report Abuse if There is a Legal Duty to Do So?*

The second presumption, that people will report if they are required to do so by law, is questionable. Some studies have found an increase in reports following mandatory reporting laws.<sup>9</sup> However, other studies suggest that even if health care professionals are required to report elder or child abuse, they are still quite unlikely to do so. A study looking at figures in South Carolina, for example (where only "practitioners of healing arts" are mandated to report), found that doctors made only 2% of the reports, compared to 6% self-reports, 19% family member reports, and 26% social service agency reports.<sup>10</sup> Other studies have found that up to 40% of American professionals required to report child abuse fail to do so.<sup>11</sup> A study in Massachusetts found an incidence of 32 cases of abuse per 1000 people in that State (26 per 1000 for incidents within the previous year); however, cases reported to the appropriate authority under Massachusetts' mandatory reporting law would have suggested the rate was only 1.8 per 1000.<sup>12</sup> Although mandatory reporting laws concerning child abuse have sometimes been accompanied by significant increases in the number of reports, studies have suggested that the accompanying greater

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9. R.S. Daniels *et al.*, "Physicians' Mandatory Reporting of Elder Abuse" (1989) 29 *Gerontologist* 321 at 323 notes that when Alabama's mandatory reporting law was enacted in 1978, 477 cases were reported. By 1987, the number of reported cases had risen to 5220.

10. Salend, *supra* note 4 at 64.

11. I. Thompson-Cooper, R. Fugère & B.M. Cormier, "The Child Abuse Reporting Laws: An Ethical Dilemma for Professionals" (1993) 38 *Can.J.Psych.* 557 at 559, citing G.L. Zellman, "Child abuse reporting and failure to report among mandated reporters: prevalence, incidence, reasons" (1990) 5 *Interpersonal Violence* 3.

12. K. Pillemer & D. Finkelhor, "The Prevalence of Elder Abuse: A Random Sample Survey" (1988) 28 *Gerontologist* 51 at 56. Lee, *supra* note 4, Appendix at 768 indicates that Massachusetts' statute requires mandatory reporting.

publicity and community education, not the existence of a mandatory reporting law, caused the increase in reports.<sup>13</sup>

There is also a further dilemma, related to the broad application of the mandatory reporting law. In essence, such a law will be simple and therefore more likely to be effective, but harder to justify ethically. Paradoxically, a more specific and limited law is easier to justify ethically, but less likely to be effective.

One of the objections to mandatory reporting is that adults are presumed to be competent and able to choose their own living situations. If a competent adult chooses to live in what others see as sub-standard conditions or chooses to remain in an abusive relationship, that decision is for the adult to make. It is hard, perhaps impossible from an ethical perspective, to justify a mandatory reporting law if it will remove freedom of choice from competent adults. However, if the law is more limited and applies only to adults who are not competent to decide for themselves, the ethical justification becomes easier. If intervention into an adult's life, and the requirement to report, will only arise if the adult is not competent to make his or her own decisions, then the analogy to child protection laws becomes stronger and the ethical justification is easier.

Accordingly, a law like that in Nova Scotia is more defensible on ethical grounds than one that required any suspected abuse to be reported, whether the victim is competent or not. Section 16 of the Act does not require that abuse be reported: rather, it makes it an offence not to report information "indicating that an adult is in need of protection." The phrase "adult in need of protection" is quite thoroughly defined in s. 3(b) to mean:

an adult who, in the premises where he resides,

- (i) is a victim of physical abuse, sexual abuse, mental cruelty or a combination thereof, is incapable of protecting himself therefrom by reason of physical disability or mental infirmity, and refuses, delays or is unable to make provision for his protection therefrom, or
- (ii) is not receiving adequate care and attention, is incapable of caring adequately for himself by reason of physical disability or mental infirmity, and refuses, delays, or is unable to make provision for his adequate care and attention.

It is only when that definition is met that the requirement to report arises. Ethically, this law is easier to defend since it does not call for intervention into the lives of competent adults.

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13. Lee, *supra* note 4 at 762.

The difficulty with this provision from a practical perspective is that it is virtually unenforceable. If a law is to cause people to act in a way that they do not wish to, then it should be very clear in imposing a duty: otherwise, it will be too easy to evade the obligation. In the case of the Nova Scotia statute, the duty to report only arises after it has been decided that a complex legal test has been met, involving not just whether the adult is abused or neglected, but also an assessment of the adult's mental competence or physical abilities, whether his or her behaviour qualifies as refusing, delaying, or being unable, and even whether the designated behaviour occurs in the premises where the person resides. Further, although this determination is a legal one (it is the ultimate decision that must be made by a judge), it must be made by the person deciding whether to report the situation. It is easy to see that anyone disinclined to report a particular case could rationalise not doing so on the grounds that it was not clear the duty arose at all. In this event, a person is only likely to make a report when he or she feels that it is appropriate to do so: but that result is in effect voluntary, not mandatory, reporting.

It is not at all clear, then, that the second presumption is true. The evidence is not authoritative, but it does appear that in a great many cases, individuals who would not otherwise report abuse will continue not to report it, whether they are required by law to do so or not.

### 3. *Will Mandatory Reporting Discover Otherwise Unknown Cases?*

The final assumption, that mandatory reporting uncovers cases that would not otherwise be found, is also questionable. One American study found that, of the cases studied, 95% had already been known to social service agencies: "Unlike other abused dependents abused elders did seek help but were unsuccessful in finding it."<sup>14</sup> If this statistic holds more widely, then there would be little point to having a controversial mandatory reporting law which did not accomplish anything new.

In addition, there is reason to question, at least in Nova Scotia, whether mandatory reporting detects the cases it is intended to detect. The impetus behind adult protection statutes is a concern about abuse of the elderly, specifically, providing help to those who are abused or neglected by their caregivers or others. At the same time, "self-neglect" is included among

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14. M. Block & J. Sinnott, "The Battered Elder Syndrome: An Exploratory Study" (unpublished manuscript, College Park, Md.: Center on Aging, 1979), quoted in Katz, *supra* note 4 at 712. This study has been criticised for having a sample which was too small and was non-random, meaning that the result is not generalisable. See Pillemer & Finkelhor, *supra* note 12 at 51.



the concerns that can be addressed under those statutes.<sup>15</sup> Whatever the original intention, figures from Nova Scotia show that in practice, cases of self-neglect make up a greater proportion of Adult Protection Services' workload than both neglect by others and all types of abuse combined. Since the Act was passed, interventions based on self-neglect have accounted for more than 60% of the cases relating to seniors.<sup>16</sup> Since the referral source is almost always someone other than the elderly person, this seems also to suggest that more than 60% of the reports made to Adult Protection Services deal not with abuse or neglect by a caregiver, but with self-neglect. Thus, it is arguable that even if the mandatory reporting law does uncover cases, it does not uncover the cases it was designed to detect.<sup>17</sup>

On the whole, then, at a practical level it is not clear that a mandatory reporting law is supportable. There are at least some people who are reluctant to report cases of abuse or neglect, so it is reasonable to consider whether something should be done. However, one cannot conclude that mandatory reporting laws actually cause people to report suspected abuse or neglect that they would not otherwise have reported. Nor can one safely conclude that the cases which will be reported are those that the law was intended to uncover.

## II. *Is Mandatory Reporting Ethically Justifiable?*

### 1. *Is the Social Construction of Elder Abuse Inherent in Adopting Mandatory Reporting an Appropriate One?*

Whether to try to detect elder abuse through mandatory reporting of suspected cases is a highly contextual question. The approach only makes sense where some public agency will receive the reports of problems, and then step in to attempt to remedy them. If the primary response to elder abuse is through private guardianship applications, or if no special legislative measures are in place, then mandatory reporting makes little

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15. In the adult protection statutes of the four Atlantic provinces, that an adult is unable to take adequate care of himself or herself is part of the criteria for determining whether the person needs protection.

16. Between April 1991 and March 1992, for example, Adult Protection Services' cases dealing with seniors consisted of 377 cases of self neglect, 71 cases of caregiver neglect, and 124 cases of physical, sexual, mental, and/or financial abuse. Between April 1992 and March 1993, cases dealing with seniors consisted of 446 cases of self-neglect, 71 cases of caregiver neglect, and 146 cases of physical, sexual, mental, and/or financial abuse: Department of Adult Protection Annual Reports, 1992, 1993.

17. This same result has been observed elsewhere: see P.L. McDonald *et al.*, *Elder Abuse and Neglect in Canada*, (Toronto: Butterworths, 1991) at 55.

sense. Thus, the question of mandatory reporting only arises where the bureaucratic structures are appropriate, where some agency is poised to respond. Failing such an arrangement, a mandatory reporting law on its own has little purpose.

A common approach to considering whether mandatory reporting is justifiable in any given instance is to consider the arguments in favour of and against it, and then weigh them against one another.<sup>18</sup> While that approach is perfectly reasonable, one weakness of it is that it can be equally applied to any situation: one could consider the pros and cons of requiring the reporting of rudeness on the street, or of criminal offences, or any variety of behaviour. In any given case, there will be advantages and disadvantages to reporting, and so an argument could be developed around any situation. But in fact, our society makes certain assumptions about the degree to which it is appropriate to intervene in other people's lives, and about the extent to which private citizens should be required to report details about one another to government agencies. Simply to look at the pros and cons of reporting in a particular situation is to ignore these inherent assumptions and to miss the place in society that any mandatory reporting law will play. With most problems, and the types of solutions we consider appropriate, the question of mandatory reporting would simply never arise.

Whether mandatory reporting, voluntary reporting, or no reporting requirement at all is the correct feature of the system, therefore, is a question of fine-tuning within one possible response to elder abuse. Such discussion might take place once a model for responding to the problem has been chosen, but we must not skip the important first step of choosing a model.

To contend that mandatory reporting is an appropriate response is to construct elder abuse as a particular type of problem: indeed, to label the problem as "elder abuse" does just as much towards that construction. Many views might be taken of the problem. The initial decision is the most important one since if the problem were regarded differently, mandatory reporting would hardly be considered as an option.

By way of analogy, it is worth looking at how the issue of prostitution has been treated. For many years, our society regarded the prostitute personally as the problem: she was responsible for corrupting others, and so the solution was to punish prostitutes. More recently, prostitutes have come to be seen as the victims of prostitution and a growing response to

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18. R.M. Gordon & S. Tomita, "The Reporting of Elder Abuse and Neglect: Mandatory or Voluntary?" (1990) 38 *Canada's Mental Health* 1; D. Ginn, "Mandatory Reporting of Wife Assault by Health Care Professionals" (1994) 17 *Dal. L.J.* 105.

the problem is the setting up of "safe houses" and other programs to assist prostitutes in leaving the street. In other jurisdictions, the problem has been seen not as one of corruption nor as one having a victim, but as a question of nuisance: the activities involved are not objectionable provided they do not interfere with others. In those places, the legal response to prostitution has been through neither punishment nor assistance, but through licensing and zoning laws.

In much the same manner, the problem of "elder abuse" can be regarded in several ways. As yet, it has been argued, no clear model by which to regard the problem has taken predominance:<sup>19</sup> several legal approaches are being taken to address the issue.<sup>20</sup> Mandatory reporting is very much a part of the "protection model": whether the analogy to child protection is justifiable or not, that model is the one that is assumed in enacting an "adult protection" statute. The problem could, however, easily be regarded in other ways. One could assume, to take an obvious example, that elder abuse was most like spousal abuse:<sup>21</sup> adult family members living together, one of whom behaves in an abusive manner towards the other. (Indeed, in many cases what we call elder abuse could simply be called spousal abuse: the fact that both parties are elderly need not change how we respond to a husband abusing his wife.) Adopting a model of this sort, it might seem appropriate to respond to elder abuse in the same sorts of ways that spousal abuse has been dealt with. This strategy would include setting up shelters, generating publicity about the issue, and establishing police and Crown policies to increase laying criminal charges when abuse occurs. Equally, one might choose not to respond to the problem as one of "abuse" at all, with its implications of a victim and an abuser. Rather than typifying one party as the "abuser", one might look on that person as the one having a problem—some extraordinary stresses in life or some other difficulty—and make finding ways to solve that problem the response to the overall situation. Further,

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19. See Leroux & Petrunik, *supra* note 8.

20. See D. Poirier, "Models of Intervention for the Guardianship and Protection of Elderly Persons in Canada" in M.E. Hughes & E.D. Pask, eds., *National Themes in Family Law* (Calgary: Carswell, 1988) at 157. See also the discussion of American legislative responses in Palincsar & Cobb, *supra* note 7 at 432–39.

21. E.A. Baumann, "Research Rhetoric and the Social Construction of Elder Abuse" in J. Best, ed., *Images of Issues: Typifying Contemporary Social Problems* (New York: Aldine de Gruyter, 1989) at 67. See also E. Mastrocola-Morris, *Woman Abuse: The Relationship Between Wife Assault and Elder Abuse* (Ottawa: Health and Welfare Canada, 1989), though this monograph assumes that the perpetrators of elder abuse are typically adult children rather than spouses. Though noting that many victims of elder abuse have been abused throughout their lives, the author suggests at page 5 that these women "get married and become victims of wife assault, grow old and find themselves being abused by their children."

one might also look at individual cases not as part of some separate phenomenon made distinct by the age of the victim, but simply as crimes like any other (assault, theft, failing to provide necessities, uttering threats), and respond by ordinary criminal court means.<sup>22</sup>

This issue of the construction of the problem is of particular concern in instances of self-neglect. In such cases, the question often amounts to whether an individual's liberty is to be taken away based on his or her behaviour. It has been noted that

If the state is acting in social defense, then the strictest safeguards are applied to assure a fundamentally fair hearing. On the other hand, if the state claims to be acting for the "best interests" of the individual, then he is often deprived of his liberty in the most casual manner.<sup>23</sup>

Interventions to "protect" individuals can easily result in those persons being permanently removed from their homes and placed in an institution. These people's rights will generally be far less well protected than if they had been charged with a criminal offence. In a criminal case, society expects to pay close attention to the rights of the person subject to the court action: in an adult protection case, it is the person's "interests" that are stressed, with less emphasis on their rights. This can have a very real impact on the types of procedures that are set up,<sup>24</sup> though the net result for the adult in either case—being required to remain in an institution where he or she would not choose to live—is quite similar.

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22. Other models for a response are also possible. Mental health legislation typically allows persons whose mental condition makes them a threat to themselves or others to be institutionalised. One could regard self-neglect by adults as simply a question of whether they meet this standard, and not adopt any special "adult protection" measures for these cases. Similarly, one could adopt the view that private application through adult guardianship laws was the appropriate response to either abuse or neglect. More generally, one could see the problem from a broader social perspective, where elderly people are devalued and left without roles in society.

23. P.M. Horstman, "Protective Services for the Elderly: The Limits of *Parens Patriae*" (1975) 40 *Mo.L.Rev.* 215 at 221.

24. To take a simple example, anyone charged with a criminal offence is entitled to contact a lawyer, and elaborate systems are in place to guarantee that everyone is aware of and able to exercise that right. Adult protection acts, in contrast, make no reference to legal counsel for the adult. A more telling difference arises in New Brunswick's adult protection legislation. Under s. 35 of the *Family Services Act*, S.N.B. 1980, c. C-2.1, the Minister can order that a medical practitioner examine an adult who is suspected to be abused or neglected: the adult has no right to refuse, though at this stage the adult has not been found incompetent, and indeed a court has not been involved at all. However, if someone in the adult's family does not wish to allow the medical practitioner into the house to perform the examination, the Minister must apply to court for an order allowing the investigation to take place. The family member's property right is thus accorded stronger protection than the competent adult's right not to be examined against his or her will.

The important point here is not which model is the best, but rather, that even to consider whether mandatory reporting is appropriate is to accept the child protection model as the way to regard the problem. Constructing the problem in that way is to make certain assumptions about the "typical" case of elder abuse. In considering whether mandatory reporting is appropriate, therefore, it is important to make explicit what those assumptions are, and to consider to what extent they are justified.

Accordingly, rather than consider the pros and cons of mandatory reporting, this paper will consider the question of what kind of problem elder abuse would have to be for mandatory reporting to be an appropriate response. What social construction of the problem must be adopted, and what does it say about the nature of the problem, the possible responses, the abuser, the victim, and the reporter, to say that there should be a mandatory reporting law?

As a starting point, one can consider the other circumstances in which mandatory reporting laws exist. They are not the norm: for the most part, private citizens have no obligation to report one another to government bodies, whether that report will help or hurt the other person. In some cases, however, varying from jurisdiction to jurisdiction, mandatory reporting laws do exist.

Such legislation may exist because of a threat to the public at large. Some diseases are "reportable", which means that health professionals must report instances of them. In some cases these diseases are communicable. In other cases (such as cancer) they might be caused by environmental factors, and instances are reported so that health officials will be able to detect unusually high rates of disease in a particular region. In some provinces, doctors are required to report patients who are not fit to drive.<sup>25</sup> In some American states, doctors are required to report gunshot wounds, on the theory that any patient who objects to the injury being reported must have been involved in some type of dangerous crime. Finally, Children's Aid statutes across the country require the reporting of suspected child abuse.

These laws fall into two groups. All but the last are based on some potential ongoing danger to the general public. If a health hazard, a person unfit to drive, or a criminal involved with the use of firearms is allowed to go uninvestigated, then further danger to new and unknown people will exist: accordingly, action is taken at an early stage. This is not the

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25. Reporting is mandatory in British Columbia, Manitoba, Ontario, and Prince Edward Island, and is permissible in Alberta, Saskatchewan, Quebec, and Nova Scotia. See O. Messenger & M. Patry, "Fitness to Drive" (1991) 6 C.M.P.A. Info. Letter 1.

rationale for mandatory reporting in elder abuse cases. Any ongoing danger is to the elderly person being abused, not to the general public.

Rather, if mandatory reporting is justified in the case of elder abuse, it is because the child protection model is adopted as the appropriate construction of the problem. Arguments in favour of mandatory reporting usually stress an analogy to child abuse, where mandatory reporting is routine.<sup>26</sup>

We will in a moment turn to the question of what construction of the situation would lead one to conclude that elder abuse should be regarded as similar to child abuse. Before that, however, it is worth challenging the argument by analogy that is frequently made: that since mandatory reporting exists for child abuse, it should also exist for elder abuse. First, mandatory reporting might not be appropriate in the case of child abuse: it has been much criticized in that context.<sup>27</sup> Second, the analogy only applies to a relatively small number of the cases that agencies deal with. The analogy is based on the argument that a court has *parens patriae* jurisdiction over children, and a responsibility to look after them: since they are neither able to protect themselves nor competent to make their own decisions, the state can step in to protect them from abuse or neglect at the hands of a caregiver. The suggested analogy is that when adults are also incompetent and unable to protect themselves from others, those adults are like children, and the state should equally become involved. This analogy might not be justified on the facts. As noted above, in Nova Scotia fewer than 1/3 of the cases of the Adult Protection Agency actually deal with an incompetent adult unable to protect himself or herself from abuse or neglect at the hands of a caregiver.<sup>28</sup> The vast majority of the time the neglect with which Adult Protection Services concerns itself is self-neglect—a situation which is not analogous to child-abuse. This fact does not automatically mean that mandatory reporting cannot be justified; it does mean, however, that any justification should be based on the real situation, not on a theoretical analogy that in practice arises in a minority of cases.

That being said, how must the problem of elder abuse be constructed in order for the protection model, and therefore the possibility of mandatory reporting, to seem like the appropriate response? Certain assumptions about the typical case have to be made for these approaches to seem

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26. See Poirier, *supra* note 20.

27. Thompson-Cooper, Fugère & Cormier, *supra* note 11; Katz, *supra* note 4 at 706–09.

28. Similar figures can be found in some U.S. jurisdictions. See D.A. Gilbert, “The ethics of mandatory elder abuse reporting statutes” (1986) 8:2 *Advances in Nursing Science* 51 at 57. It could, of course, be true that the cases reported do not reflect the actual cases.

appropriate. These assumptions relate both to the broader issue of whether a protection model should be adopted, and to the more specific question of whether mandatory reporting is a necessary or important part of that model. It is worth considering those assumptions under three headings: those about the nature of the problem, those about mandatory reporting itself, and those about the role members of society should play with regard to one another. In each case, there is reason to challenge the fundamental assumptions that would justify the "protection" construction. If that construction seems less inviting upon examination, then mandatory reporting is not ethically justified.

a. *Assumptions about the Nature of the Problem*

Most fundamentally, the adult protection model assumes that the issue is one of "protection": that is, that elder abuse is in important ways similar to child abuse. This requires first that we regard one party as a "victim", and that this person must be protected from some other party, who is a wrongdoer. It is also inherent in the construction that the victim is helpless in some way, that he or she is dependent and incompetent. Without these assumptions, it is not appropriate for the state to step in whether the adult wants help or not: it is only if one supposes that the elderly in general, or at least typical elder abuse victims, are incompetent and dependent that it seems appropriate to have the same type of legal response as for children.

The actual caseload dealt with by the Adult Protection Agency in Nova Scotia casts some doubt on whether the problem should be regarded as one involving a wrongdoer and a victim. The majority of cases the Adult Protection Agency deals with do not involve a caregiver at all: they are cases of self-neglect. There is clearly considerable difficulty in presuming that a model constructed around the dynamics of a relationship between two people is appropriate when most cases do not involve such a relationship.

Even when there is such a dynamic, there is room to question whether it involves the type of helplessness and dependence that is usually presumed to exist. Certainly that is the popular image of the victim of elder abuse: a common suggestion is that "the abused elder person is likely to be dependent, female, and of advanced age, often seventy-five or older."<sup>29</sup> Recent studies have suggested that there may be no basis for the assumption that this group is more likely to be subject to abuse than

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29. Palincsar, *supra* note 7 at 417. See also Block & Sinnott, *supra* note 14; E.E. Lau & J.I. Kosberg, "Abuse of the Elderly by Informal Care Providers" (1979) 299-300 *Aging* 10.

any other. First, studies which have produced this profile have typically not had comparison groups and have not been based on random samples, so that these characteristics might simply reflect the clientele of the agencies consulted. Second, it has been argued that most elderly persons are female, and most people over 65 have at least one chronic ailment. Accordingly, this description of the typical elder abuse victim is really just a description of the typical elderly person.<sup>30</sup> If that is so, the profile does not actually reveal who is most at risk for abuse; at best it reveals that no particular group is especially at risk. Finally, there is some reason to believe that the profile is simply inaccurate. Studies based on random samples of elderly persons have not tended to support the profile; rather, it has been found that the characteristics of the abused and the abuser differ depending on the type of abuse.<sup>31</sup> Those most likely to be subject to financial abuse, for example, are not the same group as those most likely to be neglected, or most likely to be physically abused.<sup>32</sup>

Most significantly, the assumption that abuse victims are dependent—in particular, dependent on their abuser—has been called into question. Godkin, Wolf and Pillemer in a comparative study of abused elders and non-abused elders in a home care program found that “there were no significant differences between the abuse cases and comparison group with respect to the degree of dependency of elder clients on their caregivers for financial resources, financial management, companionship, transportation, daily needs (e.g., medications), and property maintenance.”<sup>33</sup> Indeed, several studies have found that the dependency relationship is more likely to run the other way: abusers are more likely than other relatives to be financially dependent, or dependent for housing, on the victim.<sup>34</sup> That is, abuse is more likely to occur when the caregiver is dependent on the victim, not when the victim is dependent on the caregiver.

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30. McDonald, *supra* note 17 at 18–19.

31. E. Podnieks *et al.*, *National Survey on Abuse of the Elderly in Canada* (Toronto: Ryerson Polytechnical Institute, 1990); Pillemer & Finkelhor, *supra* note 12 at 54.

32. See Podnieks, *ibid.*

33. M.A. Godkin, R.S. Wolf & K.A. Pillemer, “A Case-Comparison Analysis of Elder Abuse and Neglect” (1989) 28 *Int. J. Aging & Hum. Dev.* 207 at 217. The authors caution that the comparison group consisted only of non-abused elderly with caregivers. Since many elderly do not require caregivers “it can be assumed that as a whole group the non-abused elders were more self-sufficient and less dependent.” *Ibid.*

34. K. Pillemer, “The Dangers of Dependency: New Findings on Domestic Violence Against the Elderly” (1985) 33 *Social Problems* 146, found that 64% of abusers were financially dependent and 55% were dependent for housing, compared to 38% for each category among comparison relatives. Godkin, Wolf & Pillemer, *ibid.*, found that 74.4% of caregivers involved in abuse were dependent on the victim, while only 36.8% of the non-abusive caregivers were



A belief associated with the suggestion that victims are dependent, and which motivates the choice of the child protection model, is the assumption that abusers are generally the adult children or some other younger relative of the elder.<sup>35</sup> For several reasons, this image can be inaccurate. First, it has been noted that "the notion of elderly is relative—parents in their 80s may have "children" in their 60s."<sup>36</sup> A concern for the needs of the elderly, therefore, could often be equally well addressed to the needs of the adult child caregiver. Further, while adult child caregivers are responsible for some abuse, several studies have found that spouses are as often, or more often, the responsible party. Bristowe and Collins, in a study based in British Columbia, found that the abusive caregiver was a spouse in 13 of the 29 cases, while in only eight cases was the abusive caregiver a child, daughter-in-law, or son-in-law.<sup>37</sup> Podnieks *et al.* found that abusers in cases of chronic verbal aggression and physical abuse were more likely to be spouses than children.<sup>38</sup> Pillemer and Finkelhor, in a random sample survey, found that 58% of abusers were spouses, compared to 24% who were children.

Pillemer and Finkelhor do not conclude that spouses are more violent towards their partners than children are towards their parents. Rather, they point out that the rate of abuse among elders who live with their spouses and those who live with their children is roughly the same. The important point is that "an elder is most likely to be abused by the person with whom he or she lives. Many more elders live with their spouses than with their children."<sup>39</sup>

Despite these findings to the contrary, the image of a victim of abuse as dependent and abused by an adult child persists. Protection models presume that the problem of elder abuse is one facing helpless, incompetent adults, who are dependent on their caregivers just as a child is on a parent. It is the fact that legislators are willing to make this assumption

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dependent. Podnieks *et al.*, *supra* note 31, also found a high rate of dependence among abusers. See also the studies cited in K. Pillemer, "Risk Factors in Elder Abuse: Results From a Case-Control Study" in K.A. Pillemer & R.S. Wolf, eds., *Elder Abuse: Conflict in the Family* (Dover, Mass.: Auburn House, 1986) at 239.

35. "[T]he typification of the abused as a frail, dependent, relatively blameless old person, and the abuser as the stressed adult child caregiver has been the dominant representation in the literature." Baumann, *supra* note 21 at 67.

36. *Ibid.* See S.K. Steinmetz, *Duty Bound: Elder Abuse and Family Care* (Newbury Park, Cal.: Sage, 1988) for discussion of several specific examples.

37. E. Bristowe & J.B. Collins, "Family Mediated Abuse of Noninstitutionalized Frail Elderly Men and Women Living in British Columbia" (1989) 1 J. Elder Abuse & Neglect 45.

38. Podnieks, *supra* note 31 at 38, 44 and 58.

39. Pillemer & Finkelhor, *supra* note 12 at 55.

without evidence—indeed despite evidence to the contrary—that leads to the charge that adult protection legislation is ageist.<sup>40</sup>

This stereotyping has practical consequences for the structure of legislation, and for the bureaucratic response to the problem. Some of these issues will be pursued in the next section—the assumption that services will be unwelcome, or that solutions should sometimes be imposed, for example. This underlying assumption about the elderly seems to be the primary factor leading to the structure of adult protection acts. In theory, adult protection interventions will only be made when the adult concerned is in fact incompetent: however, we do not automatically assume that most members of society might well be incompetent. As Metcalf has noted, “It has never been seriously suggested . . . that battered spouses be institutionalized or forced to defend their competency at guardianship proceedings.”<sup>41</sup> That such a requirement has been imposed on the elderly shows how society chooses to view them as a group.

#### b. *Assumptions Which Would Justify Mandatory Reporting*

In addition to constructions of the problem that arise out of adopting the protection model, certain assumptions about the appropriate way to respond to elder abuse are inherent in choosing to have mandatory reporting. To say that any suspected case of elder abuse must be reported assumes a number of things, namely:

- 1) that “abuse” is unambiguous: not simply that it is possible to tell what the cause of an injury is, but also that it is generally agreed what type of behaviour constitutes being abusive;
- 2) that elder abuse is best combatted on a case-by-case basis;
- 3) that the typical victim requires help with his or her situation, but is unable to get it;
- 4) that the required help will be unwelcome in some way, due either to the abuser or the victim: as a corollary, that the assistance offered can and should, at least sometimes, be mandatorily imposed; and
- 5) at the most basic, practical level, that once a problem is found, a solution is available: both that the resources exist to provide some type of response to the abuse, and that this response is an improvement over the status quo.

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40. Lee, *supra* note 4; Faulkner, *supra* note 4; Katz, *supra* note 4.

41. C.A. Metcalf, “A Response to the Problem of Elder Abuse: Florida’s Revised Adult Protective Services Act” (1986–87) 14 Fla.St.U.L.Rev. 745 at 775.

In some cases, one can question whether these assumptions are true. But in other cases, the primary issue is not whether these assumptions are right or wrong, rather it is a question of the approach one chooses to take, and there is no right or wrong answer. It is worth considering each assumption in turn, to see whether they are justified, and thereby to see whether the social construction that depends upon them is the most attractive and appropriate one.

There is good reason, for example, to dispute the assumption that the definition of abuse is widely agreed upon. In fact, quite the opposite is true. Many studies have noted the lack of any generally agreed definitions of “abuse” and “neglect”, and the impact of this fact on researchers.<sup>42</sup> This lack of definition certainly has an impact on researchers, but more fundamentally, it affects any person potentially required to report abuse or neglect. If there is no agreement on what constitutes the behaviour that must be reported, then what success can be expected from a requirement to report?

Mandatory reporting also assumes that a case-by-case approach is the correct way to solve the problem: if that were not so, such a stress on discovering each individual case would be unnecessary. This is certainly one method of addressing social problems, but it is not the only one. Our society chooses to combat some problems—break and enters, for example—in a case-by-case way: we try to apprehend the perpetrators of each individual crime, and punish them. Other problems are addressed not by individual cases, but in a broader way. We try to reduce smoking, for example, through greater publicity and education, focusing on the amount of information in society generally, and through disincentives such as taxes. We do not generally take aside individual smokers and deal with them one-on-one, and in particular we do not punish smokers. Other problems are dealt with by a combination of approaches: drunk driving, for example, has been addressed both by apprehending and punishing individual drunk drivers, and by increased publicity about the negative effects of the practice.

Beyond assuming that the case-by-case basis must be part of the solution, mandatory reporting helps to prevent any other approach from being taken in combination. Under the Act, the Minister has an obligation to investigate every report that is made.<sup>43</sup> Resources which are devoted to

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42. McDonald, *supra* note 17 at 2 states that “if there is one recurring theme in the literature, it is the problem of adequately defining these terms.” See also Leroux & Petrunik, *supra* note 8 at 660, and Pillemer & Finkelhor, *supra* note 12 at 52 for instances of focus groups and conference participants meeting for the purpose of formulating definitions of these terms, but being unable to do so.

43. *Supra* note 2 at s. 6.

investigating these cases obviously cannot be put toward any other purpose, such as pursuing broader approaches to reducing elder abuse.<sup>44</sup> It has been suggested that Adult Protection Program staff in Nova Scotia are limited to a reactive, rather than proactive, role.<sup>45</sup> With both mandatory reporting and mandatory investigation of all reports, it would be easy for any agency to fall into devoting all its energy to individual cases. Mandatory reporting fosters a crisis mentality.

That is not to say that a case-by-case approach is an indefensible response to elder abuse: our approach is determined by how we understand the problem. Generally, a case-by-case approach is associated with problems where the direct consequences are easily identifiable and immediate. Thus, things that we construct as crimes are generally dealt with individually, because they have easily identified victims and effects. Health risks, which usually are less identifiable and immediate, are more likely to be dealt with through public education. Elder abuse and neglect can cover the spectrum of consequences: some physical abuse could have very immediate serious consequences, while some psychological abuse might have more long term but less physically obvious results. It would not be difficult to adopt the view that there should be different reporting laws depending on the type of abuse.

The assumption that a typical victim requires help but is unable to get it is also inherent in calling for mandatory reporting. If this were not the case, then there would be no need to seek out victims: victims would be seeking out and obtaining assistance on their own. This assumption might be correct. Godkin, Wolf and Pillemer found, for example, that victims of elder abuse tend to have significantly fewer social contacts than other elderly people,<sup>46</sup> and that significantly more of them have no social contacts.<sup>47</sup> In order for mandatory reporting to be justified, however, this inability to get help should be caused by the elderly person's personal circumstances, not by the absence of available resources. One study found that, of the reported cases analysed, 95% of the abused elders had sought help from social agencies, but had not received it.<sup>48</sup> If this situation

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44. This objection to child abuse reporting laws has been noted. See Thompson-Cooper, Fugère & Cormier, *supra* note 11 at 558.

45. H. Capstick, "Adult Protection, A Study" (unpublished manuscript, Dalhousie University: Halifax, N.S., 1993) at 9.

46. Godkin, Wolf & Pillemer, *supra* note 33 at 218.

47. *Ibid.* at 219. Godkin *et al.* found, "Almost 19 percent of the abused elderly have no social contacts, whereas only 6.1 percent of the controls are without contacts." On the other hand, they also found that there were no significant differences between abused elderly and the control group with respect to church or club affiliations, or the availability of emergency support.

48. Katz, *supra* note 4 at 712, citing Block & Sinnott, *supra* note 14. Note that the Block and Sinnott study has been criticised as based on too small a sample to be generalisable. See Pillemer & Finkelhor, *supra* note 12 at 51.

is more generally true, then what is needed is not mandatory reporting to detect abuse, but increased resources to provide assistance when it is required.

Related to the assumption that help must have been unavailable is the assumption that the required help will be unwelcome in some way. If neither the caregiver (where one exists) nor the elderly person will typically object to assistance, then it would be sufficient to make the availability of help widely known. Mandatory reporting presumes that it is more important to let service providers know about elder abuse victims than it is to let elder abuse victims know about services. If the opposite assumption were made—that services would be welcome if they were available and widely-known—then the mandatory reporting should run the other way. It would be more consistent to make it mandatory, for example, for a health care professional to inform possible abuse victims or abusers of the support services and other options available to them.

Similarly, a further assumption that flows from adopting mandatory reporting is that the assistance should be mandatory as well. Once again, if the main goal were *offering* services, then it would be sufficient to make the services widely known. One only needs to make special efforts to discover abuse whatever the wishes of the parties if one will then impose a solution. On the surface, this could seem like a sensible position: one might expect an abusive caregiver to deny the existence of abuse, and therefore refuse services. If one adopts the view that the problem is generally one of abusive caregivers and dependent victims, then mandatory services, and therefore mandatory reporting, might seem appropriate.

Again, however, there is room to question whether that model is the most accurate representation of reality. Some evidence of whether assistance is unwelcome can be found in the annual reports of the Nova Scotia Adult Protection Services.<sup>49</sup> In the first two years of operation, Adult Protection Services opened a total of 898 cases, of which 635 concerned seniors (the remainder dealt with the disabled). In those two years, the Agency separated its cases according to whether they were voluntary service cases or involuntary service cases, as well as by whether they concerned abuse or neglect. Of the 898 cases opened, there were no cases of abuse where services had to be provided involuntarily. Only four of the total 898 cases were involuntary service cases, all of

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49. Obviously, these figures show only the situation of those cases with which the Agency dealt, which might not be indicative of all cases that exist. However, they are indicative of the behaviour of the parties in cases that are in fact detected in Nova Scotia, with its mandatory reporting law.

which concerned seniors and neglect. All 144 cases classified as dealing with abuse and with seniors were dealt with as voluntary service cases.<sup>50</sup>

Of course, the first two years of operation might not be representative of the caseload after several years of operation: for various reasons, different types of cases might come to the Agency's attention more readily in the beginning. In subsequent years, it is more difficult to tell whether services were accepted voluntarily or not, because the Agency no longer categorises the cases in the same way. However, the annual reports of Adult Protection Services determine that between April 1988 and March 1993, the Agency opened a total of 4125 cases, of which 2868 dealt with seniors. Court orders were obtained in only 281 of the total cases, while orders were sought but denied in a further 39 (it is not possible to determine whether the court orders dealt with seniors or the disabled). From these figures, it is apparent that court orders are infrequently sought, amounting to less than 10% of cases.

These figures might give one pause in deciding to adopt a construction that calls for mandatory reporting. The assumption that services will be unwelcome, and therefore that a solution will typically have to be imposed, is not borne out by the Nova Scotia figures. Of course, it is possible that cases which are classed as "voluntary services" in fact reflect some degree of coercion: some people will "voluntarily" accept services because they know that the services will be imposed otherwise. Further, these figures only represent the cases that come to the attention of Adult Protection Services. It is possible that services might be unwelcome in many cases that do not come to the attention of Adult Protection Services. If that is the case, however, then the Nova Scotia legislation is not discovering the cases of abuse it is aimed at, suggesting that the mandatory reporting law is not effective.

The final assumption that flows from mandatory reporting is that an effective solution is available once abuse is discovered: there is little point in uncovering abuse merely for the sake of uncovering it. If the resources do not exist to provide a remedy, then the law will serve little more than a symbolic function.<sup>51</sup> The remedies must be flexible, and suited to the needs of the elderly person. As one commentator has noted, without

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50. It is not readily apparent from the Annual Reports whether the cases included were detected because of the mandatory reporting law. Over the two years, the abused or neglected person personally was the source of the referral in only 14 cases. The case was discovered through an anonymous source in 34 instances. The referral came from immediate family or relatives in 157 cases, but whether the person making the reference was also the caregiver is not apparent. Other sources included friends and neighbours, health care professionals, social workers, and police.

51. Daniels, *supra* note 9 at 322.

adequate resources for more personalised services “agencies are left with a draconian choice between no intervention and institutionalization.”<sup>52</sup>

Further, the remedy must actually improve the situation of the elderly person. In-home support services, for example, might be valuable in a household where stress is the cause of abuse, and be welcomed by all concerned. But if institutionalization is the only effective way of removing the elderly person from the risk of abuse, then the failure of the elderly person to welcome that remedy need not be a sign of incompetence, nor even a sign that he or she is happy with the current situation. As one author has noted:

Reluctance to report may also be a function of [a] victim’s determination that it is better to stay in a situation that is less than satisfactory than to suffer the consequences of professional intervention. Lau and Kosberg found that forty-six per cent of the abused aged who received protective services were eventually institutionalized in nursing homes as a result of that intervention. Since institutionalization of the elderly frequently leads to premature death, the elderly have good reason to fear the consequences of state intervention.<sup>53</sup>

Further, placement in an institution is by no means a guarantee that abuse will not take place. The topic has not been studied in detail, but there is no doubt that abuse of residents of nursing homes by staff is a real concern.<sup>54</sup> To take adults out of their own homes and place them in an institution might not be an effective remedy to abuse. Accordingly, unless the resources exist to provide effective assistance and a real solution, a mandatory reporting law will merely uncover abuse, about which little can then be done. Without a reasonable expectation that resources exist, therefore, there is little value in having mandatory reporting.

### c. *Assumptions about the Role of Members of the Public*

Inherent in a construction that calls for mandatory reporting are also assumptions about the role of the general public. We do not, as a society, usually require that individuals take direct responsibility for one another.

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52. *Ibid.* See also Katz, *supra* note 4 at 708; Thompson-Cooper, Fugère & Cormier, *supra* note 11 at 560.

53. Katz, *supra* note 4 at 711 (footnotes omitted). See also Faulkner, *supra* note 4 at 85, reporting Connecticut figures which showed that when elderly persons are placed in nursing homes for short term care, 60% in fact never return home, but rather become permanent residents.

54. See McDonald, *supra* note 17 at 42; K. Pillemer & D.W. Moore, “Abuse of Patients in Nursing Homes: Findings from a Survey of Staff” (1989) 29 *Gerontologist* 314; and K. Pillemer & R. Bachman-Prehn, “Helping and Hurting: Predictors of Maltreatment of Patients in Nursing Homes” (1991) 13 *Research on Aging* 74.

Members of the public are not routinely required to offer assistance to one another, nor to report one another to government agencies. To require mandatory reporting in this instance is to depart from that general rule, and to assume that something about the problem of elder abuse is serious or unusual enough that every member of the public should be required to assist in solving it.

Indeed, beyond departing from unspoken assumptions about our general obligations to one another, mandatory reporting actually conflicts with some stated assumptions. In particular, any mandatory reporting law which applies to health professionals assumes that the response to elder abuse is more important than confidentiality: that nurses, doctors, and other professionals should sometimes play a “policing” role with regard to their patients.

It is this aspect of the law which is frequently cited as giving rise to an ethical problem. Health care professionals have a duty of confidentiality to their patients: mandatory reporting overrides that duty.<sup>55</sup> Thus, nurses and doctors are obliged to report information given to them in confidence, even over the direct objections of the patient. Such a violation of confidentiality will likely interfere with the therapeutic relationship. It could also be counter-productive, leading abuse victims to avoid professional assistance.<sup>56</sup> There is no clear answer as to which approach is better, but mandatory reporting is part of a social construction which tends towards a “surveillance society”, and could be seen as an “erosion of fundamental democratic ideals and principles.”<sup>57</sup>

This departure from usual assumptions about the obligations of members of society to one another is particularly evident when one considers that failing to comply with the duty to report is an offence.<sup>58</sup> That is, the issue is not simply whether reporting suspected abuse is the right thing to do. The question is whether it is *so* right that the failure to do so should be punishable by the state. It is “right” to throw a rope to a drowning victim, but it is not an offence to fail to do so. Any construction of the problem which assumes that mandatory reporting is required assumes that failing to report suspected abuse is a failure of a sort that warrants punishment.

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55. Section 5(1) of the Act, *supra* note 2, states that the obligation to report arises whenever a person “has information, whether or not it is confidential or privileged, indicating that an adult is in need of protection.”

56. Gordon & Tomita, *supra* note 18 at 3; Palincsar & Cobb, *supra* note 7 at 437.

57. Gordon & Tomita, *ibid*.

58. See *supra* note 2 at s. 16: “Every person who has information, whether or not it is confidential or privileged, indicating that an adult is in need of protection and who fails to report that information to the Minister is guilty of an offence under this Act.”



Finally, one assumption which does not seem essential, but which in fact is made in most adult protection legislation in Canada, is that the problems of abuse and neglect are similar enough that no distinction need be drawn between them. Adult protection statutes in Canada extend their reach to cover both neglect and abuse, but they do not provide separate legislative responses to the problems. Thus, the duty to report, as well as the test for imposing assistance and all other aspects of the legislation, apply in the same way to abuse, neglect, and self-neglect.

Researchers have noted that this assumption is problematic, and can affect studies of prevalence of abuse.<sup>59</sup> Further, some studies have shown that victims of abuse and neglect do not show the same characteristics, a difference which holds true for their caregivers.<sup>60</sup> It is not hard to imagine that different causal factors might motivate abuse and neglect. One can choose to adopt the same legislative response in all circumstances, but to do so assumes that the differences are of no significance.

### *Conclusion*

In the end, it is difficult to reach a conclusion about whether mandatory reporting is appropriate in isolation because that issue raises the question of the construction of the issue.

Mandatory reporting has to be justified both from a practical and an ethical point of view. Regarding the former, there is room to doubt whether the law in fact makes any difference. Assuming that reluctance to report exists, mandatory reporting laws—and in particular the mandatory reporting law in Nova Scotia—do not seem likely to change behaviour. Without greater evidence that a mandatory reporting law will have an effect, therefore, there is little reason to have one.

Even if some type of reporting law is called for, a blanket law requiring everyone to report all suspected abuse might not be the best approach. One possibility would be to limit the reporting obligation to health professionals, as is done in many instances in the United States. This approach would at least not dictate a new role for every member of the public, and would do less to promote a “surveillance society”. At the same time, it is by no means a complete solution, if it is a solution at all. Those who would be bound to report are the very people who also have an obligation of confidentiality to their patients. Such a law might still have the effect of discouraging openness between patients and health professionals, or of discouraging those who are abused from seeking help.

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59. Pillemer & Finkelhor, *supra* note 12 at 53; Salend, *supra* note 4 at 66.

60. Podnieks, *supra* note 31; Pillemer & Finkelhor, *supra* note 12.

If some type of reporting law is called for, a voluntary reporting law is probably a better alternative. In New Brunswick and Prince Edward Island, for example, individuals are not required to report suspected abuse, but they are protected from liability if they do so in good faith.<sup>61</sup> Such a requirement causes fewer ethical problems,<sup>62</sup> and probably reflects actual practice even where mandatory reporting laws are in effect.

Even on the narrow question of whether a mandatory reporting law is appropriate within the protection approach, then, the answer seems to be “no”. The justification for mandatory reporting cannot be clearly made out on either practical or ethical grounds.

But far more important than making a choice between mandatory and voluntary reporting is to recognise that this debate occurs within a model which presupposes a particular approach to “elder abuse”. It is far from clear that it is helpful to adopt the terminology of “abuse”. The assumptions it entails—that the parties involved should be identified as an abuser and a victim, that a victim would only refuse help if he or she were threatened or incompetent, and so on—have a very significant effect on the legislative approach taken. In particular, these assumptions help make mandatory reporting seem more acceptable: how can one not be opposed to abusing the elderly? And knowing that an elderly person is being abused, why would one not report it? Nonetheless, this construction of the issue is very questionable.

Mistreatment of elderly people does take place, and it is an important problem. However, casting one person in the role of villain is not necessarily the approach most likely to help: as other commentators have suggested, although “‘blaming the victim’ solves nothing, it is perhaps equally true that neither, in the final analysis, does ‘blaming the abuser’.”<sup>63</sup> It would be possible to regard the problem not as caregivers abusing those in their care, but rather as overstressed caregivers needing more support. If we regarded the problem in this latter way, the more important question would become not whether we report the caregiver, but what we do to assist the caregiver. Further, it is not necessary to adopt a single construction of the issues: cases differ, and more than one approach to the issue can usefully be taken.

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61. In Prince Edward Island, this protection is extended to “any person”: *Adult Protection Act*, R.S.P.E.I. 1988, c. A-5, s. 4. In New Brunswick, only a “professional person” is protected, but that term is defined quite broadly. See the *Family Services Act*, S.N.B. 1980, c. C-2.1, s. 35.1 and s. 35.1(5).

62. Gordon & Tomita, *supra* note 18 at 4–5 also adopt this position.

63. Bristowe & Collins, *supra* note 37 at 63–64.

In any event, mandatory reporting seems to attract significantly more reports of self-neglect than of abuse or neglect by another: in that case, the question of how to characterise the caregiver does not arise. However, when the problem to be addressed is that of adults who are not taking adequate care of themselves, the mandatory reporting issue becomes quite different. When we report abuse by a caregiver, we are reporting the abuser. But when we report self-neglect, we are reporting the victim. The question then is whether to report a person who is not living his or her life according to the standards that the reporter thinks appropriate.

We do not have laws that make it mandatory to report other incompetent people, even when they are a danger to themselves or others. There is surely some irony in the fact that, when adult protection cases go to court, the party opposing the Minister is almost always not an alleged abuser, but the elderly person—nominally the person who is being “protected”, but also the person trying to persuade the judge not to intervene. That is not to say that state interventions cannot sometimes be warranted in these cases, nor that a mandatory reporting law aimed at these concerns cannot possibly be justified. Rather, justification should be made based on the real concerns arising, not based on a misperception or mislabelling of the problem.

There is a danger that mandatory reporting laws can “exist to express state legislative commitment to the goals of case discovery and protective services without requiring disbursement of substantial state resources.”<sup>64</sup> Better would be an approach which focused more on the underlying problems in the lives of the elderly than on the results of those problems. Solutions should look to protection of the interests of the elderly as defined by the elderly themselves, not by some government agency. Resources should be devoted to addressing the problems that the elderly perceive, whether those problems are caused by their own inabilities, by their interaction with family members, or by their interaction with government and private agencies.

A legislature which seriously followed this route in drafting a statute would not find itself asking what sort of a reporting law was appropriate. For that further reason, the justification for mandatory reporting fails.

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64. Daniels, *supra* note 9 at 322.